(1) 312 Sup. Ct. 42

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 561.

STEAMTUG "S. & H. No. 2" INC., as owner of the Steamtug "S. & H. No. 2",

Respondent-Libellant,

—against—

Steamtug "LACKAWANNA", MARGARET A. JAMISON and MARTHA A. JAMISON, co-partners doing business as Jay Street Terminal, claiming as charterers of tug "Lackawanna",

Claimants-Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

OSCAR R. HOUSTON,
Proctor for Petitioners,
No. 99 John Street,
New York City.

INDEX.

	PAGE
Petition	1
Statement	1
Decisions Below	2
The Question Presented	3
Statutory Provisions Involved	3
Reasons for Allowance of Writ	4
Brief	9
Opinions Below	9
Jurisdiction	9
Specification of Error	10
Argument	10
Conclusion	17

TABLE OF CASES CITED:

Ariadne, The, 80 U. S. 475, 478, 479 ..... 4, 10

Holly Park, 39 F. (2d) 572 ..... 5, 17

Illinois, The, 103 U. S. 298 at 299 ..... 4, 5, 12

Industry, 29 F. (2d) 29 ..... 5, 6, 15, 16, 17

Larsen v. *Portland California S. S. Co.*, 66 F. (2d) 326, 330 (C. C. A. 9th Cir.) 5, 13

Long Island R. R. Co. v. *Killien*, 67 F. 365 ..... 5, 15

Madison, The, 250 Fed. 850 14

Merrill C. Hart, The, 188 F. 49 ..... 5, 15

M. J. Rudolph, The, 292 Fed. 740 15

32543

PAGE

New York, The, 175 U. S. 187 at 204 ..... 4, 11

N. Y. Central No. 28, 258 F. 553 ..... 5, 15

Pennsylvania, The, 19 Wall. 125, 137, 138 14

Robinson v. *Detroit & C. Steam Nav. Co.*, 73 Fed. 883 at 892 (C. C. A. 6th Cir.) 5, 12

Salutation, The, 79 F. (2d) 609 14

Transfer No. 8, 25 F. (2d) 628 ..... 5, 15

OTHER AUTHORITIES CITED:

Constitution of United States, Article 3, Section 2.... 10

Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 (Title 28, Chapter 9, Section 347, U. S. Code) Section 240 10

United States Code, Title 33, Chapter 3:
(33 U. S. C. A. Sec. 151-231) 3, 6
Article 18, Rule VIII (U. S. C. A. Sec. 203) . . 3, 6, 15, 16
Article 21 (33 U. S. C. A. Sec. 206) 3, 6, 15
Article 24 (33 U. S. C. A. Sec. 209) 3, 6, 15
Article 29 (33 U. S. C. A. Sec. 221) 4, 6

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Claimants-Petitioners.

THE PETITION OF MARGARET A. JAMISON AND MARTHA A. JAMISON FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Statement.

This petition is brought to review that part of the decision of the Circuit Court of Appeals which modifies the decision of the District Court and holds the Steamtug "Lackawanna" solely liable for damage which resulted from a collision occurring in the East River on the early morning (about 2 A. M.) of February 26, 1938 between

a carfloat in tow alongside of the tug "Lackawanna" and the port bow of the tug "S. & H. No. 2".

The facts are fully stated in the opinions below. So far as material here they may be briefly summarized as follows: Until shortly before the collision both tugs were proceeding up the East River with the "Lackawanna" slightly astern and to port of the "No. 2". When about opposite Pier 21, Manhattan, the "No. 2" turned to port and continued this turn until she was angling downstream. As a result of this maneuver and the continued forward progress of the "Lackawanna", the bow of the "No. 2" came into contact with the bow of the float which was in tow alongside the "Lackawanna".

Decisions Below.

The District Court held that the situation of the vessels at the time of the collision was one of special circumstances (D. C. Op. R., p. 126) and that both vessels were at fault for failing to maintain a proper lookout (D. C. Op. R., p. 128). Libellant, accordingly, was granted a recovery of one-half of the damage sustained by its tug "S. & H. No. 2".

The Circuit Court of Appeals accepted the finding that both tugs had failed to maintain proper lookouts, but held that at the time of the collision the vessels were in an overtaking situation and the "Lackwanna", as the overtaking vessel, was solely at fault for not keeping clear of "S. & H. No. 2" (R., pp. 138, 139).

It disposed of the District Court's finding that "S. & H. No. 2" was at fault for not maintaining a proper lookout by holding that since "S. & H. No. 2" was the overtaken vessel, she was not required to maintain a lookout in so far as the movements of the overtaking vessel were concerned (R., p. 139).

The Question Presented.

Does the fact that a vessel is an overtaken vessel in an overtaking situation relieve her from the duty imposed upon all vessels of maintaining a proper lookout at all times; and, specifically, may the overtaken vessel change her course more than 90° without maintaining any lookout for other vessels in her vicinity?

Statutory Provisions Involved.

The rights and duties of vessels navigating the inland waters of the United States are governed by the provisions of Title 33, Chapter 3, 33 U. S. C. A., Sections 151-231. The particular provisions involved in the present case are Article 24 (33 U. S. C. A. Sec. 209) which provides that

> "every vessel, overtaking any other, shall keep out of the way of the overtaken vessel";

and Rule VIII of Article 18 (U. S. C. A. Sec. 203), which provides that if the overtaking vessel wishes to pass the vessel ahead, she must blow appropriate signals and await an answer. This Rule concludes as follows:

> "The vessel ahead shall in no case attempt to cross the bow or crowd upon the course of the passing vessel."

The foregoing must be read in connection with Article 21 (33 U. S. C. A. Sec. 206) which reads as follows:

> "Where, by any of these rules, one of the two vessels is to keep out of the way, the other shall keep her course and speed."

Another section to be considered in this connection is Article 29 (33 U. S. C. A. Sec. 221) which reads as follows:

> "Usual additional precautions required generally. Art. 29. Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case. (June 7, 1897, c. 4, Sec. 1, 30 Stat. 102.)"

Reasons for Allowance of Writ.

I. The decision of the Circuit Court of Appeals is in conflict with the following decisions of this court holding not only that an overtaken vessel must maintain a proper lookout but that all vessels must maintain a proper lookout at all times.

> *The Illinois*, 103 U. S. 298, at 299;
> *The Ariadne*, 80 U. S. 475, 478, 479;
> *The New York*, 175 U. S. 187 at 204.

In the case of *The Ariadne, supra,* speaking of the importance of maintaining a vigilant lookout in the crowded waters of New York Harbor, this Court said (p. 479):

> "Every doubt as to the performance of the duty, and the effect of non-performance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary."

In the case of *The Illinois, supra*, in holding an overtaken vessel at fault for failure to maintain a lookout, this Court said (p. 299):

> "While a man stationed at the stern as a lookout is not at all times necessary, no vessel should change her course materially without having first made such an observation in all directions as will enable her to know how what she is about to do will affect others in her immediate vicinity."

II. The decision of the Circuit Court of Appeals is in conflict with the following decisions of the Circuit Courts of Appeals in other circuits, holding that an overtaken vessel must maintain a proper lookout.

SIXTH CIRCUIT:

Robinson v. *Detroit & C. Steam Nav. Co.*, 73 Fed. 883 at 892;

NINTH CIRCUIT:

Larsen v. *Portland California S. S. Co.*, 66 F. (2d) 326, 330.

III. This is not an isolated decision, but is the last in a series of decisions by which the Circuit Court of Appeals for the Second Circuit has extended the privilege of an overtaken vessel. The course of the decisions may be traced by reference to the following cases decided by the same court, which are discussed in the brief submitted herewith:

Long Island R. R. Co. v. *Killien*, 67 F. 365;
N. Y. Central No. 28, 258 F. 553;
Transfer No. 8, 25 F. (2d) 628;
Merrill C. Hart, 188 F. 49;
Industry, 29 F. (2d) 29;
Holly Park, 39 F. (2d) 572.

Under the present decision all limitations on the privilege of the overtaken vessel appear to have been removed, and the overtaken vessel may completely reverse her course without being subject to the ordinary rules as to lookout. We submit that the privilege in question, when carried to this extreme, constitutes a serious danger to navigation, particularly in the crowded waters of New York Harbor.

IV. The decision rests on an erroneous interpretation of the provisions of U. S. Code, Title 33, Chapter 3, Sections 203, 206, 209 and 221, regulating the rights and duties of overtaking and overtaken vessels.

Under Article 24 (33 U. S. C. A. §209) the overtaking vessel is required to keep out of the way of the overtaken vessel. Article 21 (33 U. S. C. A. §206) provides that, whenever one vessel must keep out of the way, the other shall keep her course and speed. Rule VIII of Article 18 (33 U. S. C. A. Sec. 203) provides that the overtaken vessel must not attempt to cross the bow of the overtaking vessel. The Circuit Court of Appeals in its decision in this case gives no effect to the foregoing statutory provisions but follows its previous decision in the *Industry*, *supra*, that these statutory provisions do not apply until after an exchange of signals between the two vessels.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit commanding that court to certify and send to this court for its review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case numbered and entitled on its Docket No. 269, October Term, 1940:

STEAMTUG "S. & H. No. 2" INC., as owner of the Steamtug "S. & H. No. 2",

Libellant-Appellant,

—against—

Steamtug "LACKAWANNA", MARGARET A. JAMISON and MARTHA A. JAMISON, co-partners doing business as Jay Street Terminal, claiming as charterers of tug "Lackawanna",

Claimants-Appellees,

and that the said decree of the United States Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court, insofar as the same holds the tug "Lackawanna" solely liable for the damage sustained by the tug "S. & H. No. 2", and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioners will ever pray.

MARGARET A. JAMISON and
MARTHA A. JAMISON,

By OSCAR R. HOUSTON,
Counsel for Petitioners.